No. 14370

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM CHERNEKOFF, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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TABLE OF AUTHORITIES CITED

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REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on November 12, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the Armed Forces of the United States. [T. R.[1] pp. 3-4.]

On November 30, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on December 14, 1953.

On December 14, 1953, trial was begun in the United States District Court for the Southern District of Cali-

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[1]"T. R." refers to Transcript of Record.

fornia by the Honorable Harry C. Westover, without a jury, and the appellant was found guilty as charged in the indictment. [T. R. pp. 7-8.]

On December 28, 1953, the appellant was sentenced to imprisonment for a period of 3 years and judgment was also entered. [T. R. pp. 7-8.] Appellant appeals from this judgment. [T. R. p. 17.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The indictment charges a violation of Section 462 of Title 50, App., United States Code; the statute provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Section 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

"Indictment—No. 23223 CD Criminal
[U. S. C., Title 50, App., Sec. 462—
Selective Service Act, 1948]

"The Grand Jury charges:

"Defendant William Chernekoff, Jr., a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 113, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on August 11, 1953, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [T. R. pp. 3-4.]

On November 30, 1953, appellant appeared for arraignment and plea, *in propria persona,* before the Honorable Harry C. Westover, United States District Judge, and

entered a plea of not guilty to the offense charged in the indictment.

On December 14, 1953, the case was called for trial before the Honorable Harry C. Westover, without a jury, and on December 28, 1953, appellant was found guilty as charged in the indictment. [T. R. pp. 7-8.]

On December 28, 1953, the appellant was sentenced to imprisonment for a period of 3 years in a penitentiary. [T. R. pp. 7-8.]

Appellant assigns as error the judgment of conviction on the following grounds:

The District Court erred:

1. In not concluding that the classification of appellant was without basis in fact.
2. In not concluding that there was a failure of proof in connection with the induction ceremony.
3. In not concluding that a new trial should have been granted appellant.

IV.

STATEMENT OF THE FACTS.

On June 29, 1950, William Chernekoff, Jr., registered with the Selective Service System at Local Board No. 113, Alhambra, California.

Appellant filed SSS Form 150, Special Form for Conscientious Objector.

On November 30, 1951, Chernekoff was classified in Class I-A-O, and was mailed SSS Form 110, Notice of

Classification. Chernekoff requested a personal appearance before the Local Board and at the same time appealed his classification. Later Chernekoff appeared before the Local Board and his file was reviewed and he was retained in the same classification.

On April 30, 1953, Chernekoff was classified in Class I-A by the Appeal Board and he was advised of this action.

On July 27, 1953, a C-190 Form was mailed to Appellant ordering him to report for induction into the Armed Forces of the United States on August 11, 1953.

On August 11, 1953, Appellant, William Chernekoff, Jr., refused to be inducted into the Armed Forces of the United States.

V.

PRELIMINARY STATEMENT.

Although an argument shall be made relative to the merits of this appeal, the Appellee contends that it is axiomatic that matters not raised at the trial cannot be considered on appeal. This applies even when as in the case at bar the defendant defends himself. [T. R. p. 7.] An exception is recognized, of course, in matters of jurisdiction but jurisdiction is not involved here. Appellant concedes the jurisdiction of the District Court.

VI.

ARGUMENT.

POINT ONE.

The Selective Service System Had Basis in Fact to Classify the Appellant in Class 1-A and Its Action Was Neither Arbitrary nor Capricious.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling.

Richter v. United States, 181 F. 2d 591 (9th Cir.);
Tyrrell v. United States, 200 F. 2d 8.

Congress has granted exemptions and deferments from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service system. The duty to classify and to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is upon the registrant claiming an exemption or deferment to establish his eligibility therefor to the satisfaction of the local or appellate board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Every registrant is presumed available for military service and every registrant who fails to establish his eligibility for exemption or deferment to the satisfaction of a local or appellate board is placed in Class 1-A. Title 32, C. F. R., Section 1622.10.

United States v. Schoebel, supra.

The classification by the Local Board and thereafter by the Appeal Board, made in conformity with the regulations was final.

Estep v. United States, 327 U. S. 114;
Cox v. United States, 332 U. S. 442.

The Selective Service file of the appellant indicates that the Local and the Appellate Boards considered the claims for exemption by the appellant. Both boards rejected the appellant's claim based on the information presented to them. It is noted that the appellant personally appeared before the Local Board and the Hearing Officer at the Department of Justice hearing.

At the personal appearance and hearing conducted by the hearing officer, the demeanor, good faith and sincerity of the appellant in his claims for a conscientious objection exemption were observed.

The recommendation of the Hearing Officer based on his observations and the record was that the appellant's claims be denied. [R. 36-37.|] In *United States v. Simmons,* June 15, 1954, ... F. 2d ..... (7th Cir.), the Court stated in this regard that:

> "The conscientious objector claim admits of no such exact proof. Probing a man's conscience is, at best, a speculative venture. No one, not even his closest friends and associates, can testify to a certainty as to what he believes and feels. These, at most, can only express their opinions as to his sincerity. The best evidence on this question may well be, not the man's statements or those of other

witnesses, but his credibility and demeanor in a personal appearance before the fact finding agency. We cannot presume that a particular classification is based on the board's disbelief of the registrant, but. just as surely, the statutory scheme will not permit us to burden the Board with the impossible task of rebutting a presumption of the validity of every claim based ofttimes on little more than the registrant's statement that he is conscientiously opposed to participation in war. When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption, we may not further inquire as to the correctness of the board's order."

Basis in fact further exists in the Selective Service file of the Appellant. On pages 23-24 of Government's Exhibit No. 1, facts which could constitute a basis for the appeal board's classification include the following:

1. The Appellant's conduct and daily mode of life were inconsistent with religious sincerity.

2. Contrary to the tenets of Appellant's religion which prohibits the use of intoxicating beverages, the Appellant did use such beverages over a substantial period of time.

POINT TWO.

Replying to Appellant's Assignment of Error, the Government Contends That the Appellant's Refusal to Submit to Induction in Writing Constitutes a Refusal to Submit to Induction Within the Purview of the Indictment and the Appellant Was Properly Convicted.

Reference is made to the Memorandum of Opinion filed by the Trial Judge in the case of *Duron v. United States,* No. 14303, now on appeal to this Court. Judge Westover states on page 17 of the Transcript of Record in the *Duron* case:

> "When a conscientious objector states emphatically that he will not be inducted into the armed services of the United States, it seems rather useless, and an empty gesture, to require him to stand on his feet and request that he take one step forward when his name and the branch of service into which he has already refused induction are announced.
>
> "Defendant herein is charged in the Indictment with knowingly failing and refusing to be inducted into the armed forces of the United States; and this Court knows of no more emphatic manner in which he could have announced his refusal to be so inducted than by giving the written statement, in his own handwriting, found in his selective service file. The defendant is found guilty as charged."

The appellee contends that the action of the appellant of acknowledging his refusal to submit to induction in writing [Govt. Ex. No. 1, p. 59] constitutes a refusal to submit to induction into the armed forces within the purview of the charge contained in the Indictment and the appellant was properly convicted.

In *Billings v. Truesdell,* 321 U. S. 542 at page 557, the Supreme Court stated:

> "He who reports to the induction station but refuses to be inducted violates Section 11 of the Act clearly as one who refuses to report at all . . . The Selective Service Regulations state that it is the 'duty' of a registrant who receives from his local board an order to report for induction 'to appear at the place where his induction will be accomplished,' 'to obey the orders of the representatives of the armed forces while at the place where his induction will be accomplished,' and 'to submit to induction.' Sec. 1633.21(b). Thus it is clear that a refusal to submit to induction is a violation of the Act rather than a military order. The offense is complete before induction and while the selectee retains his civilian status."

POINT THREE.

There Was No Denial of Due Process of Law Before the Department of Justice Hearing Officer or the Appellate Board of the Selective Service System.

Congress has provided for exemption from service in the armed forces of the United States by reason of religious training and belief. However, there is no constitutional right to such an exemption.

United States v. MacIntosh, 283 U. S. 605;

Girouard v. United States, 328 U. S. 61.

Title 50, App., U. S. Code., Section 456(j) provides in pertinent part:

> ". . . any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board be entitled to an appeal to

> the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned. . . ."

Under the authority of the above statute, Selective Service Regulations were adopted (Title 32, C. F. R., Sec. 1626.25) and provision is made for an investigation and report by agents of the Federal Bureau of Investigation. These reports are forwarded to a Hearing Officer for his use in the hearing he conducts with respect to the character and good faith of the claims of conscientious objection of each registrant claiming exemption therefor.

In *United States v. Nugent,* 346 U. S. 1, the Supreme Court stated that due process requires

> "the standards of procedure to which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board."

Here, Appellant was advised that he would be permitted to make a full and complete presentation of his claim of conscientious objection to participation in war, by his witnesses or their sworn statements, or his own testimony.

The Appellee submits that while due process does not require that the facts of the *Nugent* case, *supra,* be met, the Government has exceeded the standard of the *Nugent* case, *supra,* here.

United States v. Simmons, supra.

POINT FOUR.

There Was No Denial of Due Process to the Appellant by the Local Draft Board.

The Appellant alleges that the failure of the local draft board to post a list of advisors to registrants in the local board office constitutes a denial of due process. The Appellee contends that the local practice of advising registrants by use of registrars, 120 in number in the County of Los Angeles, the Government Appeal Agents, and the clerks in and of the local draft boards constitutes substantial compliance with this regulation. To hold otherwise is to ignore the actualities and practicalities of the situation.

The error, if any, is properly denominated harmless error and should be disregarded. Federal Rules of Criminal Procedure, Rule 52(a):

> "Any error, defect, irregularity or variance which does not affect the substantial rights shall be disregarded."

Furthermore, the action of the appeal board cures the alleged defects of the local board and completely supersedes the action of the local board in classifying the registrant even though the classification be the same.

Cramer v. France, 148 F. 2d 801;
Tyrrell v. United States, 200 F. 2d 8;
Reed v. United States, 205 F. 2d 216.

VII.

CONCLUSION.

Appellant was properly classified by the Selective Service System and the classification of I-A was with basis in fact.

There was no denial of due process of law in the classification of the Appellant.

There was no error of law in the rulings of the Trial Court and therefore, the conviction should be affirmed.

Respectfully submitted,

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